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39-438

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 221.

ANDREW J. DAVIS, APPELLANT,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SILVER BOW COUNTY, MONTANA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 13, 1887.

ennes derived therefrom, and that in the expenses of keeping up and rehabilitating the plantations were included the costs of the buildings. If this be so, and they were now allowed to take the building free of charge, they would be twice paid therefor.

Knowing the great amount of care and labor given by your Honors to the decision of this cause, we have made this application with great reluctance. But the large interest of Gay's estate, which has been contesting this litigation for nineteen years, at great cost, without yet having received anything, and without the possibility of recovering much, if the present decree stands, has determined us to lay before your Honors for reconsideration such portions of the decree as, in our opinion, are erroneous; and we pray that your Honors will grant us a rehearing thereon, or give such other relief as may be proper.

Respectfully submitted,

J. WARD GURLEY, JR.,

Attorney for D. C. Mellen, Adm'r.

I hereby certify that the above petition for rehearing is, in my opinion, well grounded, and is not made for the purpose of delay.

J. WARD GURLEY, JR.,

Attorney, etc.

9-430
39-438

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SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1890.

1 In the District Court of the Second Judicial District of Montana Territory in and for Silver Bow County.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Plaintiff,
vs.
ANDREW J. DAVIS, Defendant.

Whereas the above-named plaintiff and defendant are parties to certain questions in difference hereinafter stated which might be the subject of a civil action—

Now, therefore, the said parties, to avoid delay and expense and to have decided as speedily as practicable the law in regard to said questions, do hereby without action agree upon the following case containing the facts upon which the controversy depends, and present a submission of the same to the above-entitled court, which would have jurisdiction if an action had been brought.

The following are agreed to as the facts in the case:

1. That the First National Bank of Butte is now and was during all of the year 1885 and before that time a corporation duly
2 created under and by virtue of the laws of the United States relating to national banks, and located and carrying on a general banking business in Butte City, in said county of Silver Bow and Territory of Montana, and that the capital stock of said bank is one hundred thousand dollars, divided into one thousand shares of one hundred dollars each.

2. That during all of said year 1885 the said defendant, Andrew J. Davis, was the owner and holder of nine hundred and forty shares of the capital stock of said bank, and the said shares of the capital stock of said bank and that said shares were during all of said year and are now of the true value in money at private sale and of the market value (which is the same) of one hundred and twenty-five dollars each.

3. That for and in the said year 1885 there was duly levied and assessed, according to the laws of Montana Territory, in said Silver Bow county, for territorial, county, and other purposes, upon all property in said county subject to taxation, an ad valorum tax amounting in all to thirteen and three-tenths mills on each dollar of assessed valuation.

4. That said nine hundred and forty shares of stock of the said The First National Bank of Butte were assessed for taxation,
3 in the manner prescribed by the laws of said Montana Territory for said year 1885, to said defendant, Andrew J. Davis (who then owned and held said shares in said county of Silver Bow), at their estimated true value in money at private sale and at their market value (which is the same); that said defendant has not nor has said bank or any one of him or it ever paid said tax on said shares so assessed as aforesaid or of any part of said tax.

5. That in the general assessment in said Silver Bow county for said year 1885 shares of stock in corporations generally were assessed

in accordance with the provisions of section 1003 of chapter LIII of the fifth division of the Revised Statutes of Montana Territory, as amended by the act of the Legislature of February 22, 1881, on page 67 of the laws of 1881, and where the entire capital stock of any incorporated company were invested in assessable property in said territory such stock or the shares thereof were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent from the United States were assessed at the Government price of five dollars per acre without regard to their market value; that there are a large number of mining corporations in Montana Territory whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims. It is agreed that all objections to the right of plaintiff to sue for unpaid taxes of said county of Silver Bow or to make this agreed case and submission and all objections to the regularity of the levy of the tax and of the assessment to the defendant for the year 1885 of said above-mentioned shares of stock be, and are hereby, waived, and for the purpose of this case it is admitted that the board of commissioners aforesaid is the proper plaintiff herein, and that all the proceedings of the levy and assessment of said tax to defendant upon said shares of stock owned by him are and have been regular and are valid and legal if said shares of stock are subject to taxation at all.

The object of this agreed case is to have upon the above facts the decision of the court and judgment accordingly as hereinafter provided upon each and all of the following questions of law in difference between the parties without regard to the regularity of the levy of the tax or of the assessment to defendant or the question of proper parties:

1. Under the laws of the United States and of the Territory of Montana are shares of stock in national banks located in said Territory subject to taxation at all.

2. Upon the facts in this case was the said assessment and taxation of said shares of stock to defendant in violation of or in conflict with the restriction contained in section 5219 of the Revised Statutes of the United States relating to the taxation of shares of national banks and providing that such taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of the individual citizens of the Territory.

It is agreed—

1st. That if the court shall decide that said shares are not taxable at all, or shall decide the 2d question above stated in the affirmative, judgment shall be rendered herein for the defendant for costs subsequent to the trial.

2. That if the court shall decide that said shares are taxable and shall also decide the said 2d question above stated in the negative judgment herein shall be rendered for the said plaintiff and against the said defendant for the sum of fifteen hundred and sixty-two and $\frac{15}{100}$ dollars (being the amount of tax at thirteen and three-tenths mills on each dollar on said nine hundred & forty shares of defendant at one hundred and twenty-five dollars per share

for said year 1885) without penalty and without interest prior to judgment and for costs subsequent to the trial.

The right of appeal from any judgment of said district court herein according to law is reserved to each party hereto.

In witness whereof the said parties hereto, plaintiff and defendant, by their respective attorneys thereunto authorized, have signed this case and submission this 15th day of February, A. D. 1886.

W. W. DIXON,
Att'y for B'd of Com's of S. B. Co., Plaintiff.
KNOWLES & FORBIS,
Att'ys for A. J. Davis.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

W. W. Dixon, being duly sworn, says that he is the attorney
7 for The Board of Commissioners of the County of Silver Bow, the plaintiff in the above-entitled matter; that the controversy between the parties stated in the foregoing case and submission is real, and the proceedings thereon are in good faith to determine the rights of the parties, as therein stated.

W. W. DIXON.

Subscribed and sworn to before me this 15th day of February, A. D. 1886.

F. C. WEBSTER,
Notary Public.

Filed Feb'y 15, 1886.

R. L. DAVIS, *Clerk,*
By CHAS. S. WARREN, *Deputy.*

In the District Court of the Second Judicial District of Montana Territory in & for Silver Bow County.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Plaintiff,
vs.
ANDREW J. DAVIS, Defendant. } #1456.

This action, being an agreed case between the parties, having been heretofore *agreed* by counsel for the parties—W. W.
8 Dixon, for the plaintiff, and Knowles & Forbis, for the defendant—and duly heard and taken under advisement by the court:

Now, on this 17th day of March, A. D. 1886, it is considered and adjudged by the court—being advised in the premises, and the court having found for the plaintiff, and having decided the question of law stated in the agreed case, so that by said agreed case plaintiff is entitled to judgment, as therein provided—that plaintiff have and recover of the said defendant the sum of fifteen hundred and sixty-

two $\frac{75}{100}$ dollars, with legal interest from this date, and also plaintiff's costs subsequent to the trial, taxed at two $\frac{50}{100}$ dollars.

March 17, 1886.

Filed March 17, 1886.

R. L. DAVIS, *Clerk*,
By H. S. CLARK,
Deputy Clerk.

9 In the District Court of the 2d Judicial District in & for Montana Territory, County of Silver Bow.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERR'Y, Plaintiff,
vs.
ANDREW J. DAVIS, Defendant.

To W. W. Dixon, Esq., attorney for the above-named plaintiff, and to the clerk of the above-named court:

Please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of Montana Territory from the judgment herein made and entered in the district court above named on the 17th day of March, A. D. 1886, in favor of plaintiff in said action and against defendant, and from the whole thereof.

Dated the 16th day of July, A. D. 1886.

KNOWLES & FORBIS,
Att'ys for Defendant.

I hereby accept service of the above notice of appeal and waive copy this the 16th day of July, 1886.

W. W. DIXON,
Att'y for Pl'ff.

Filed July 16th, 1886.

R. L. DAVIS, *Clerk*,
By CLARK, *Deputy*.

10 In the District Court of the 2d Judicial District in & for Montana Territory, County of Silver Bow.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Plaintiff,
vs.
ANDREW J. DAVIS, Defendant.

Whereas the defendant, Andrew J. Davis, in the above-entitled action this day appeals to the supreme court of Montana Territory from a judgment entered against him in said action in the district court above named in favor of The Board of Commissioners of the County of Silver Bow, Montana Territory, the plaintiff in the above-entitled action, on the 17th day of March, 1886, for the sum of fifteen hundred seventy-two and $\frac{75}{100}$ dollars and costs of suit, taxed at ten

dollars: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and freeholders of Silver Bow county, Montana Territory, do jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him not exceeding three hundred dollars, to which amount we acknowl-
11 edge ourselves jointly and severally bound; and whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of thirty-one hundred forty-five and $\frac{50}{100}$ dollars, being double the amount named in the said judgment appealed from, — or any part thereof be affirmed or the appeal be dismissed the appellant shall pay fifteen hundred seventy-two & $\frac{75}{100}$ dollars, the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed if affirmed only in part, and all damages and costs which shall be awarded against appellant upon the appeal.

Dated the — day of July, 1886.

JOSEPH A. HYDE.
HIRAM KNOWLES.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Joseph A. Hyde and Hiram Knowles, being first duly sworn, on oath doth depose and say, each for himself, that he is worth
12 the amount for which he has become liable in the above undertaking over and above his debts and liabilities and property exempt from execution.

JOSEPH A. HYDE.
HIRAM KNOWLES.

Subscribed and sworn to before me this the 16th day of July, 1886.

JOHN F. FORBIS,
Notary Public.

Filed July 16, 1886.

R. L. DAVIS, *Clerk,*
By H. S. CLARK,
Deputy Clerk.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

I, Reuben L. Davis, clerk of the district court of the second judicial district of Montana Territory, county of Silver Bow, do hereby certify that the above and foregoing is a full, true, and correct transcript of the agreed case, judgment, notice, and undertaking on appeal as appears of record in my office at Butte City, M. T.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this — day of Aug., A. D. 1886.

REUBEN L. DAVIS, *Clerk*,
[SEAL.] By H. S. CLARK,
Deputy Clerk.

13 In the Supreme Court of Montana Territory. August Term, A. D. 1886.

THE BOARD OF COUNTY COMMISSIONERS OF SILVER BOW COUNTY, MONTANA TERRITORY, Respondent,
vs.
ANDREW J. DAVIS, Appellant.

Be it remembered that in the present term of August, A. D. 1886, the above-entitled action was brought into the supreme court of Montana Territory by virtue of an appeal, and the transcript of the record of the court below herein duly filed; and, the said cause coming on to be heard before the court on the said transcript of record, the same was agued by counsel; thereupon the court held the said cause under advisement.

And afterwards, in the January, A. D. 1887, term of said court, said cause came on in said court for judgment on appeal; whereupon the court delivered its decision and opinion in writing in the following terms, to wit:

14 In the Supreme Court of Montana Territory. January Term, A. D. 1887.

THE BOARD OF COMMISSIONERS OF SILVER BOW COUNTY, Pl'ff & Respondent,
vs.
ANDREW J. DAVIS, Def't & Appellant.

Appeal from second district, Silver Bow county.

WADE, C. J., delivered the opinion:

This is an action by the plaintiff and respondent to recover the sum of $1,562.75 from the defendant and appellant for taxes levied for the year 1885 upon certain shares of the capital stock of the First National Bank of Butte owned by the appellant. The cause was tried upon the following agreed statement of facts:

1. That the First National Bank of Butte is now and was during all of the year 1885 and before that time a corporation duly created under and by virtue of the laws of the United States relating to national banks, and located and carrying on a general banking business in Butte City, in the county of Silver Bow and Territory of Montana, and that the capital stock of said bank is one
15 hundred thousand dollars, divided into shars of one hundred dollars each.

2. That during all of said year 1885 the said defendant, Andrew

J. Davis, was the owner and holder of nine hundred and forty shares of the capital stock of said bank, and that said shares were during all of said year and are now of the true value in money at private sale and of the market value (which is the same) of one hundred and twenty-five dollars each.

3. That for and in the said year 1885 there was duly levied and assessed according to the laws of Montana Territory in said Silver Bow county, for territorial, county, and other purposes, upon all property in said county subject to taxation an ad valorem tax, amounting in all to thirteen and three-tenths mills on each dollar of assessed valuation.

4. That said nine hundred and forty shares of the said The First National Bank of Butte were assessed for taxation in the manner provided by the laws of said Montana Territory for said year 1885 to said defendant, Andrew J. Davis (who then owned and
16 held said shares in said county of Silver Bow), at their estimated true value in money at private sale and at their market value (which is the same).

5. That said defendant has not nor has said bank or any one for him or it ever paid said tax on said shares so assessed as aforesaid or any part of said tax.

6. That in the general assessment in said Silver Bow county for said year 1885 shares of stock in corporations generally were assessed in accordance with the provisions of section 1003 of chapter 53 of the fifth division of the Revised Statutes of Montana Territory, as amended by the act of the Legislative Assembly of February 22, 1881, on page 67 of the Laws of 1881, and where the entire capital stock of any incorporated company was invested in assessable property in said Territory such stock or the shares thereof were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent from the United States were assessed at the Government price of five dollars per acre without regard to their true market value; that there are a large number of mining cor-
17 porations in Montana Territory whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims.

There was a judgment for the plaintiff for the amount claimed, from which the defendant appeals and asks for a reversal of the judgment for two reasons, viz: First, that, under the provisions of the general banking act, shares of stock in national banks in the Territories are exempt from taxation; and, second, that, by the laws of Montana and by the showing of the agreed statement of facts, there has been an unjust discrimination against the appellant in the taxation of his shares of national bank stock. Both of these questions arise under the following section of the national banking act:

SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct

the manner and place of taxing all the shares of national
18 banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as any other real property is taxed. U. S. Rev. Stats., p. 1015.

1. The propositions of the appellant is that by virtue of this section the right to tax national bank shares is limited to national banks located and doing business in a State and that such shares are not subject to taxation in a Territory.

In construing this section reference must be had to all the sections and to the general scope and meaning of the act of Congress authorizing and establishing our national banking system. The sections or different parts of every statute must be construed together
19 and as they are modified by one another. If the object and intent of a statute is distinctly defined and clearly expressed ordinary words will be given such a meaning, if they have such a meaning, as to make them harmonize with such object and intent, even though they might be so interpreted as to be in conflict therewith. The word "state" has various meanings. It may mean a place; it may mean an organized political community. If used in the latter sense the word might mean the same as territory, for that is also an organized political community. The general scope and purpose of this act of Congress was to give to the people of the United States, whether they lived in a State or in a Territory, a uniform system of banking, whereby they should be authorized to form associations for carrying on that business. It requires such associations in their certificates to name the place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district and the particular county, city, town, or village. Sect. 5134.

Here the words state, territory, or district mean simply the
20 place—the locality in which the business is to be carried on.

The right to form such associations is made a privilege—a franchise—which is distributed equally among the people of the States and Territories according to the population of either (see sects. 5178, '9, '80), and every association is allowed to charge and to receive interest at the rate allowed by the laws of any State, Territory, or district where the bank is located. (Sect. 5197.)

Penalties for violating any of the provisions of the act by the officers of any banking association are the same whether such violation occurs in a State or Territory. Sect. 5239.

The banking system created and established by the act extends alike to the States and Territories. The Constitution and the laws of the United States, which are not locally inapplicable, have the same force and effect in the Territories as elsewhere within the United States. (U. S. Rev. Stats., 1891.) The Territories are as much a part

of the United States as are the States. There is but one banking system for all. The provisions of the banking act are locally inapplicable to the Territories. The legislative powers of the Territories extend to all rightful subjects of legislation. It is just as competent for a territorial Legislature to determine and to direct the manner and the place of taxing personal property as it is for a State Legislature to do the same thing. In this respect their powers are alike. Either may levy and assess taxes upon property subject to taxation within its jurisdiction. Each must raise a revenue by taxation for carrying on the local government. The national banking system extending over each alike, it would seem that the words of section 5219 in assessing taxes imposed by the authority of the State within which the association is located ought to be interpreted to mean the legislative authority or the authority within the locality in which the banking association is situated that may rightfully and legally levy and assess taxes upon personal property. Otherwise burdens are imposed upon banking associations in the States and exemptions are allowed to those in the Territories, which would be inconsistent with the whole spirit of the act, which was designed to give a uniform system to every locality. If this interpretation of the word "state" be correct, then there are no restriction words in section 5219, which is a part of chapter three of the act, and is controlled by section 5157, which provides that the provisions of chapter two, three, & four, which are expressed without restrictive words as applying to "national banking associations" or to associations, apply to all associations organized to carry on the business of banking under any act of Congress. If this interpretation is not correct, then by virtue of the same section the real estate of any banking association in a Territory is exempt from taxation, and by virtue of section 5242 attachments and injunctions may issue against banking associations before final judgments if located in a Territory; and so if the word state means one of the United States and not the place in which the banking association is located, then, while the Comptroller of the Currency by virtue of section 5181 is given authority to equalize the currency in a State according to the population, he has no such power in the Territories. These incongruities are avoided and the act made consistent and harmonious by giving to it a uniform operation in the States and Territories, which can be done without violating any of its words or phrases and which was the evident purpose of Congress when it provided a banking system for the people of the United States.

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2. The second proposition is that by the laws of Montana and by the showing of the agreed statement of facts there has been an unjust discrimination against the appellant in the taxation of his shares of national bank stock. The statute of the Territory concerning property subject to taxation provides, among other things, for the taxation of "stocks & shares in any bank or company, incorporated or otherwise, and whether by any other State or Territory or whether situated in this Territory or not, except that where the entire capital stock of any incorporated company shall be invested

in assessable property in the Territory of Montana such stock shall not be taxed." (12th Sess. Laws, p. 67.)

The sixth finding of fact is, in substance, that in the year 1885, in Silver Bow county, shares of stock in corporations generally were assessed in accordance with the provisions of the fore-
24 going statute, and where the entire capital stock of any incorporated company was invested in assessable property in the Territory such stock or the shares thereof were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent were assessed at the Government price of five dollars per acre without regard to the market value; that there are a large number of mining corporations whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims.

It is also found as a fact that nine hundred and forty shares of stock in the First National Bank of Butte, in said county, were assessed and taxed for the year 1885 at the market value and at the same rates as other property in said county. Shares in corporations represent the capital stock. If the capital stock is taxed the shares ought not to be, and if the shares are taxed the capital stock ought to be exempt. If both are taxed there would be double taxation. To prevent this the Legislature provided that if the entire
25 capital stock was in the Territory and assessable, the shares should be exempt. The converse of this would be true, that if the capital stock was not assessable the shares would be subject to taxation. If the capital stock was not within the Territory, and therefore not assessable, or if it was exempt from taxation by law the result would be the same and the shares would be subject to taxation. National bank shares are taxable, but the right to tax them is subject to the condition that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens. (Sect. 5219, U. S. Rev. St.)

How is other monied capital in the Territory taxed? This is the first thing to be determined in order to ascertain if the taxation of bank shares is an unjust discrimination. The agreed statement of facts shows that there are a large number of mining corporations in the Territory whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims assessed for taxation at the rate of five dollars per acre without regard to market value. The capital stock being assessable and
26 subject to taxation, the shares which merely represent such capital stock are and ought to be exempt. Otherwise the same property would be taxed twice for the same year. But if, for any reason the capital stock of these corporations could not be reached for taxation, then the shares would become assessable under the statute of the Territory. National bank stock is in that condition. It is not subject to taxation. It is represented by Government bonds which are exempt, and hence bank shares become assessable the same as the shares in other corporations whose capital stock is not invested in the Territory; and in order to show an unjust discrimination against bank shares it would be necessary to show

that the taxation of such shares resulted in a higher or greater tax upon the money invested than results in the taxation of the capital stock of those corporations whose capital stock is assessable in the Territory.

It is immaterial whether the taxation is upon the shares or upon the capital stock if the tax upon the money invested is equal.

27 Mining claims are real estate, and it is legal for national banks to purchase and to hold such claims. If other corporations invest in such claims and they are taxed at the rate of five dollars per acre without regard to the market value there is no unjust discrimination against national banks, unless the mining claims which they may own are taxed at a higher rate. Nothing of this kind appears in the agreed statement of facts.

It is said in appellant's argument that it may be safely asserted that no corporation formed under the laws of Montana and doing business in the Territory but has its entire capital stock invested in assessable property in the Territory, and that the shares of stock in such corporations are exempt from taxation.

Taking this statement to be true, it simply shows that the capital stock is taxed instead of the shares, but does not touch the proposition that the shares ought to be exempt where the capital stock is not taxed. Suppose the capital stock is not in the Territory or assessable here, and that is the case in hand. The fact that the shares in other corporations whose capital stock is assessable in the

28 Territory are exempt from taxation has no bearing on the question. The inquiry is as to an unjust discrimination against bank shares. If money is invested in such shares and taxed at the same rate as money invested in mining or other corporations, then there can be no just cause of complaint, because in one case the money is taxed as shares and in the other as capital stock.

There is no discrimination against a bank where its capital stock is taxed in the form of shares, and in favor of other corporations whose shares are exempt, but whose capital stock is taxed. In either case the monied capital of the corporation is taxed, and it does not make much difference by what name it is called. It would be an unjust discrimination in favor of national banks not to tax their shares (their capital stock being exempt), while at the same time subjecting to taxation the capital stock of other corporations whose entire capital stock is invested in assessable property in the Territory. Shares in national banks are taxable even though the entire capital stock is invested in United States bonds, which

29 are exempted from taxation.

Van Allen *vs.* Assessors, 3 Wall., 573.

People *vs.* Commissioners, 4 Wall., 244.

It is not shown that the entire capital stock of the bank of the appellant or that any part of such stock is invested in assessable property in Montana whereby its shares of stock become exempt. The board of commissioners for each county sits as a board of equalization to hear complaints and to adjust and to equalize taxation, but it is not shown that the bank or the appellant ever appeared

before such board to have the assessment on these shares reduced or remitted or to show that there was a discrimination against the bank in assessing these shares. If it had been shown there or here in the agreed statement of fact that the capital stock of the bank was invested in assessable property in the Territory, or that it owned property in the Territory which had been assessed at a higher rate than that of similar property belonging to other corporations in the Territory, or that such deductions had not been made as had been allowed to such other corporations, then there would have
30 been just cause of complaint. If there were no deductions to be made from the amount of the tax the tax would be legal, even though the statute prohibited the making of authorized and lawful deductions. The denial of a right is no injury to him who has no right to enforce. Says Justice Miller in "Supervisors *vs.* Stanley," 105 U. S. R., 311: "What is there to render it (the statute of New York) void as to a shareholder in a national bank who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What interest has he in a question that only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect?"

The statute of the Territory is not invalid because it subjects bank shares to taxation and exempts the shares of other corporations. In order to affect its validity it would be necessary to show that
31 there is an unjust discrimination in the amount of the tax upon the money invested in bank shares and money invested in the shares of other corporations in the Territory, and this cannot be shown while it appears that in one case the money is taxed at equal rates as shares and in the other as capital stock invested in the Territory.

The appellant has no legal interest in the question as to how money invested in other corporations in the Territory is taxed unless he can show that his money invested in bank shares is taxed at a greater rate, thereby making an unjust discrimination against his investment. Such discrimination does not appear for the following reasons:

1. It is not shown that the bank has any of its capital stock invested in assessable property in Montana.

2. It is not shown that it is the owner of any mining claims taxed at a greater rate than the mining claims of other corporations in the Territory.

3. It is not shown that any deductions were denied in taxing the bank shares that were allowed to other corporations in the Territory.

32 4. It is not shown but what the taxation of bank shares is just equivalent to the taxation of other corporations whose entire capital stock is invested in assessable property in the Territory.

5. It does not appear that money invested in bank shares is sub-

jected to any higher or greater rate of taxation than any other monied capital invested in the Territory.

6. On the contrary, it does appear that if the entire capital stock is assessable in the Territory the shares which represent such stocks ought to be exempt, and that if the capital stock is exempt for any reason the shares, in order that there may be no discrimination in their favor, ought to be taxed.

7. If money invested in a national banking association or other corporation is taxed at the same rates as other property, it is immaterial whether the tax is levied upon the shares which represent the capital stock or upon the capital stock itself. In either case the same result is arrived at and the money invested is subject to the same and equal taxation.

8. The right to form banking associations being a privilege
33 of great value, by means of which large profits are earned for the shareholder, this right or privilege is property, and the shares become subject to taxation though the capital stock is exempt, and so a banking association has the same relation to the statute of the Territory as would any other corporation whose capital stock was not invested in assessable property in the Territory, in which case the shares would be subject to taxation.

The judgment is affirmed with costs.

D. S. WADE,
Chief Justice.
J. H. McLEARY,
Asso. Justice.
THOS. C. BACH,
Asso. Justice.

Filed Jan'y 4, 1887.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was entered in said cause in the words & figures following, viz:

34 In the Supreme Court of Montana Territory. January Term, A. D. 1887.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Respondent,
vs.
ANDREW J. DAVIS, Appellant.

Judgment on Appeal.

Be it remembered that in the term of August, 1886, of the supreme court of Montana Territory the above-entitled cause was brought into said court by virtue of an appeal, agreeably to law and the rules of this court, and the transcript of the record of the court below therein duly filed and the cause docketed for hearing at said term, and the said cause, coming on to be heard before the court on the

said transcript of record, was argued by counsel and submitted. Thereupon the court took the same under advisement.

And afterwards, to wit, in the January, A. D. 1887, term of this court, said cause came on for the decision and judgment of the court on appeal.

35 Whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment of the court below entered in this cause on the 17th day of March, 1886, be, and the same is hereby, affirmed with costs. And it is hereby further ordered and adjudged by this court that said plaintiff and respondent recover against said defendant, appellant, Andrew J. Davis, — dollars for its costs herein expended and have execution therefor.

4th January, 1887.

And afterwards, to wit, on the 15th day of September, 1887, said appellant, Andrew J. Davis, filed his appeal from the above-recited judgment to the Supreme Court of the United States to reverse said judgment, of which said appeal, or petition therefor, the following is a copy, viz:

36 *Appeal.*

In the Supreme Court of the United States.

ANDREW J. DAVIS, Appellant,
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Appellee.

To the honorable the Supreme Court of the United States:

The appeal of Andrew J. Davis, the above-named appellant, respectfully shows that upon the 15th day of February, A. D. 1886, the above-named appellee and the above-named appellant agreed to certain facts, which represented the dispute between them as to the construction of a certain statute of the United States, and made said facts a record in the district court of the second judicial district in and for Montana Territory, held in and for the county of Silver Bow, and upon said agreed facts the said dispute was submitted to the said district court, who, upon the 17th day of March, A. D. 1886, rendered a judgment, as in such cases warranted by law in said Territory, against said appellant, which judgment is in words

37 and figures as follows, to wit:

In the District Court of the Second Judicial District of Montana Territory in and for Silver Bow County.

"THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Plaintiff,
vs.
ANDREW J. DAVIS, Defendant.

This action, being an agreed case between the parties, having been heretofore agreed by counsel for the parties—W. W. Dixon, for the

plaintiff, and Knowles & Forbis, for the defendant—duly heard and taken under advisement by the court—

Now, on this 17th day of March, A. D. 1886, it is considered and adjudged by the court, being advised in the premises, and the court having found for the plaintiff, and having decided the question of law stated in the agreed case, so that by said agreed case plaintiff is entitled to a judgment as therein provided, that plaintiff have and recover of the said defendant the sum of fifteen hundred and
38 sixty-two $\frac{75}{100}$ dollars, with legal interest from this date, and also plaintiff's costs subsequent to the trial, taxed at two $\frac{50}{100}$ dollars.

March 17, 1886."

That said cause was submitted to said court without the intervention of a jury.

That said defendant duly appealed from said judment in said district court to the supreme court in and for Montana Territory; said appeal was taken on the 16th day of July, A. D. 1886.

That in said supreme court, on the fourth day of January, A. D. 1887, the judgment of said district court, above set forth, was affirmed in all particulars.

That said judgment in said supreme court was the final judgment in said cause in the courts of Montana Territory; that the construction of a statute of the Congress of the United States is involved in the decision of this cause. Wherefore this appellant appeals from the whole of said judgment of said supreme court of Montana Territory, and respectfully prays that the judgment of the
39 said supreme court of Montana, the agreed statement of facts, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew upon said statement, and that the said judgment of said supreme court of Montana and every part thereof may be reversed, and that appellant may have a judgment for his costs herein expended, and such other judgment as — the said Supreme Court of the United States shall seem just.

August 5, 1887.

HIRAM KNOWLES,
Attorney and Counsellor for Appellant.

Allowance of Appeal.

In the Supreme Court in & for Montana Territory.

ANDREW J. DAVIS, Appellant,
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, M. T., Appellee.

40 Upon reading and considering the application of Andrew J. Davis for an appeal in the above cause, and being fully advised in the premises, it is hereby ordered that the appeal in the

above cause be, and the same is hereby, allowed, and the bond on appeal be and the same is fixed at twenty-five hundred dollars.

WM. J. GALBRAITH,
Asso. Justice of the Supreme Court in and for Montana Territory.

Bond on Appeal.

In the Supreme Court of the United States.

ANDREW J. DAVIS, Appellant,
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Appellee.

Know all men by these presents that we, Andrew J. Davis, Joseph A. Hyde, and J. R. Boyce, Jr., of Butte City, Silver Bow county, Montana Territory, are firmly held and bound unto the Board of County Commissioners of the County of Silver Bow, Montana
41 Territory, in the sum of two thousand five hundred dollars, to be paid to the said The Board of Commissioners of the County of Silver Bow, Montana Territory; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 5th day of September, 1887.

Whereas the above-named Andrew J. Davis hath taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of Montana Territory: Now, therefore, the condition of this obligation is such that if the above-named Andrew J. Davis shall prosecute his said appeal to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

A. J. DAVIS. [SEAL.]
JOSEPH A. HYDE. [SEAL.]
J. R. BOYCE, JR. [SEAL.]

42 Endorsed: "I hereby approve of the within bond this the 6th day of September, 1887. Wm. J. Galbraith, associate justice of the supreme court in and for Montana Territory." Filed Sept. 15, 1887. I. R. Alden, clerk.

43 In the Supreme Court of Montana Territory.

ANDREW J. DAVIS, Appellant,
vs.
THE BOARD OF COMMISSIONERS OF SILVER BOW CO., MONTANA TERRITORY, Appellee.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing forty-one pages, numbered

from 1 to 41, inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled action in said court as the same appear of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 20th day of Sept., 1887.

Seal Supreme Court, Montana Territory.

ISAAC R. ALDEN, *Clerk.*

44 In the Supreme Court of the United States.

ANDREW J. DAVIS, Appellant,
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Appellee.

By the Honorable Wm. J. Galbraith, asso. justice of the supreme court of Montana Territory, to the Board of Commissioners of the County of Silver Bow, Montana Territory, appellee:

Whereas the above-named Andrew J. Davis has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the supreme court of Montana Territory made in favor of you, the said The Board of Commissioners of the County of Silver Bow, Montana Territory, and has filed the security required by law: You are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Helena, in the Territory of Montana, this the 6th day of September, A. D. 1887.

WM. J. GALBRAITH,
Associate Justice of the Supreme Court of Montana Territory.

ANDREW J. DAVIS, Appellant,
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY OF SILVER BOW, MONTANA TERRITORY, Appellee.

TERRITORY OF MONTANA,
County of Silver Bow.

Hiram Knowles, being duly sworn, saith that on the 15th day of September, A. D. 1887, at Butte City, M. T., he served on the
45 above-named appellee a copy of the appeal and a copy of the citation filed in this cause with the clerk of the supreme court of Montana Territory by delivering said copy of the citation to W. W. Dixon, attorney for appellee, personally, and by leaving said copy of the appeal for said appellee in the clerk's office of the supreme court of Montana Territory as aforesaid.

HIRAM KNOWLES.

Subscribed and sworn to before me this the twentieth day of September, A. D. 1887.

[Notarial Seal John F. Forbis, Montana.]

JOHN F. FORBIS,
Notary Public.

[Endorsed:] Andrew J. Davis, appellant, *vs.* The Board of Commissioners of the County of Silver Bow, Montana Territory, appellee. Citation. Filed Sept. 20, 1887. I. R. Alden, clerk.

Endorsed on cover: Montana T. sup. court. No. 221. Andrew J. Davis, appellant, *vs.* The Board of County Commissioners of Silver Bow County, Montana Territory. Filed October 13, 1887.

Office Supreme Court U. S.
FILED,
JAN 14 1891
JAMES H. McKENNEY,
CLERK.

In The Supreme Court

OF THE

UNITED STATES

ANDREW J. DAVIS,
Appellant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SILVER BOW COUNTY, TERRITORY OF MONTANA.
Appellee.

APPELLANT'S BRIEF.

JAMES W. FORBIS,
Counsel for Appellant.

INTER MOUNTAIN PRINT
BUTTE, MONTANA

In The Supreme Court

OF THE

UNITED STATES

ANDREW J. DAVIS,

Appellant.

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SILVER BOW COUNTY, TERRITORY OF MONTANA.

Appellee.

STATEMENT.

This action was commenced and tried in the District Court of Silver Bow county, Territory of Montana, before the Court sitting without a jury, upon an agreed statement of facts.

Andrew J. Davis was the owner of nine hundred and forty shares of the capital stock of the First National bank of Butte upon which an assessment for taxes was levied by the officers of Silver Bow county. The appellant refused to pay the levy and an agreed case was submitted to the District Court. The District Court found in favor of the validity of the tax,

and from that judgment the appellant appealed to the Supreme Court of the Territory of Montana, where the judgment of the District Court was affirmed.

This case was then taken to the Supreme Court of the United States on writ of error, which writ is now pending in this court and numbered 220. Subsequently, in view of the provisions of the act of April 7, 1874, C. 80, 18 Stat. 27, the case was brought into this Court on appeal.

SPECIFICATION OF ERRORS.

First—The Court erred in rendering judgment against the appellant for the reason that under the provisions of Section 5219, Rev. Stat. U. S., authority is given to the States to tax the shares of national banks, but no such authority is vested in a Territory.

Second—The Court erred in rendering judgment against the appellant for the reason that it is shown by the agreed statement (*paragraph 4 of Agreed Case, pp. 1–2 of Record*) that the taxes levied were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the Territory, contrary to the prohibition contained in Sec. 5219, Rev. Stat.

The statute of the Territory of Montana referred to in the agreed case is in the words and figures following, to wit:

"SECTION 1003. All other property, real or personal, within the Territory, is subject to taxation in

the manner herein directed, and this is intended to embrace improvements on lands and lots in towns, including land bought from the United States and from this Territory, whether bought on credit or otherwise, being franchises which, for the purposes of this chapter, are to be considered real property; ditches and flumes, horses, oxen and other cattle, except calves under eight months old, which shall be exempt from taxation; mules and asses, sheep, swine and goats; money in coin or gold dust, whether in possession or on deposit, and including bank bills; property or labor due from solvent debtors on contract or on judgment, whether in this Territory or not, mortgages and other like securities; stocks or shares in any bank or company incorporated or otherwise, and whether incorporated by this or any other Territory or not, *except that where the entire capital stock of any incorporated company shall be invested in assessable property in the Territory of Montana, such stock shall not be taxed;* public stock or lands; household furniture not otherwise exempt, including gold and silver plate, musical instruments, watches and jewelry; pleasure carriages, stages, hacks and other vehicles for transporting passengers; wagons, carts, drays, sleds and other descriptions of vehicles or carriages; boats and vessels of every description, whenever registered or licensed, and whether navigating the waters of this Territory or not, if owned either in whole or in part by persons who are inhabitants of this Territory; annuities, but not including pensions from the United States or any of the States."

In defining what property shall be exempt from taxation, subdivision "ninth" of Section 1002 of Revised Statutes of 1879 provides:

"Mines and mining claims, except those held under a patent from the United States."

Section 1051 of the same statute provides:

"That from and after the passage of this article no direct tax shall be levied upon any placer claim, quartz lead or lode, except to the extent of the price paid for any mining claim in obtaining patent therefor from the government of the United States, and the only taxation of the proceeds thereof shall be that provided in this article."

APPELLANT'S BRIEF.

This case is properly brought into this Court on appeal. Since the enactment of the statute of April 7, 1874, all cases in the Territories tried before a jury must be brought into the Supreme Court by a writ of error, and all other cases by appeal. The distinction between law and equity cases was disregarded by the statute, and the sole distinction, as to whether the case should be brought up by writ of error or appeal was to be determined by the fact, whether it was tried before a jury, or before the Court.

Stringfellow vs. Cain, 99 U. S., 610.
Hecht vs. Boughton, 105 U. S., 235.
Woolf vs. Hamilton, 108 U. S., 15.

The Court has jurisdiction of thiis case, notwithstanding the amount involved is less than Five Thousand Dollars. The questions involved in the appeal, are questions of the construction of a United States statute, and of its validity. The appellant claims under both assignments of error that he is protected by the United States statutes from the taxation which it is attempted to impose on him, and that the appellee by enforcing its claim, disregards and sets aside the effect of that statute. Under such circumstances the Court will take jurisdiction of the case, regardless of the amount involved in the controversy. The stock of the national bank is taxable if at all only by authority of the United States. If that authority has not been given by the statute in question, then the courts of the Territory of Montana have by imposing the tax misconstrued and annulled the statutes of the United States and have therefore assailed its validity and the authority of the United States.

Insurance Co. vs. Augusta, 93 U. S., 116.
Rail Road Company vs. Maryland, 21 Wall., 467.
McGuire vs. The Commonwealth, 3 Wall., 387.

The authority in the state to tax national bank shares is a permissive one, given by Congress, and but for such permission the states could neither tax the bank or the stock.

People vs. Weaver, 100 U, S., 539-543.

The statute giving the state the right to tax the stock of national banks, gives the authority to a state only, and not to a territory. (Sec. 5219 Rev. Stat.) As there is no express authority vested in the territory, a tax levied by a territory is void.

That the word state does not *include* territory, and that the use of the word in the statute has been uniformly construed to *exclude* territory, see:

Hepburn vs. Ellzey, 2 Cranch, 445.
Corporation of New Orleans vs. Winter, 1 Wheat. 91.
1 Kent's Commentaries, Marg. p. 385.

Throughout the act establishing national banks the word "territory" is used in conjunction with the word state. This fact is cited by the Supreme Court of the territory to show that the word state in section 5219 was intended to include the word territory. On the contrary we contend that this of itself is conclusive to show that Congress did not intend to extend the right of taxation to the territory. Wherever a right, privilege or authority is granted to the territory it is in express terms, and no doubt is left as to the construction intended. If Congress intended to give the territory the right of taxation, why should the word territory be omitted from this one section? Evidentally the omission was intentional.

The same Section, 5219, also provides that the taxation on national bank stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state.

The quotations from the Statutes of Montana heretofore made show:

First—That where the entire capital stock of any corporation is situated in the Territory of Montana the stock of such corporation is not assessable, but the levy is made upon the property of the corporation.

Second—That mining claims before patent are not assessed at all, and after a patent has been issued are assessed at five dollars per acre, regardless of the actual value of the property.

It is also shown by the agreed case that a large number of corporations coming under the first designation exist in the Territory of Montana, and that a part of their property consists of mining property patented and otherwise. Under this state of facts it is clear that the Montana mining corporations do not pay anything like their share of the taxes. Or, in other words, that such corporations are shielded by the statute from taxation and that all other property, including national bank stocks, are assessed at a greater rate than these mining corporations or, for that matter, at a greater rate than mining companies or individuals engaged in the mining business. While it is not unnatural that the Territory should foster its principal industry of mining, we claim that it cannot do so without violating the provisions of Sec. 5219, and that if it persists in such favoritism, it must forego the taxation of national bank stocks

Touching the question of the construction of section 5219, with reference to the equality of taxation we call the attention of the Court to the following cases:

People vs. Weaver, 100 U. S., ~~168~~ 539
Pelton vs. National Bank, 101 U. S., 143.

We respectfully submit that the judgment of the Supreme Court of the Territory of Montana should be reversed.

JAMES W. FORBIS,
Counsel for Appellant.

Suggestion of Death and Petition for Substitution.

IN THE SUPREME COURT OF THE UNITED STATES.

ANDREW J. DAVIS,

Appellant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SILVER BOW COUNTY, MONTANA TERRITORY.

Appellee.

Now comes James A. Talbott and respectfully represents that Andrew J. Davis, the appellant herein, died in Butte City, in Silver Bow County, State of Montana, on the 11th day of March, 1890; that James A. Talbott was duly appointed special administrator of the estate of Andrew J. Davis, deceased, by the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow, and that no person has, as yet, qualified as the regular administrator of said estate.

Wherefore, your petitioner prays that he may be substituted as the appellant in this cause, and that the cause may proceed to hearing in the regular manner.

JAMES A. TALBOTT

JAMES W. FORBIS,

Counsel for Appellant.

Office Supreme Court U. S.
FILED,
JAN 29 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

ANDREW J. DAVIS, APPELLANT,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SILVER BOW COUNTY, MONTANA TERRITORY.

Appeal from the Supreme Court of Montana Territory.

APPELLEE'S BRIEF.

J. H. McGOWAN,
Att'y for Appellee.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

ANDREW J. DAVIS

v.

THE BOARD OF COUNTY COMMISSIONERS OF SILVER BOW COUNTY, MONTANA TERRITORY.

No. 221.

Appeal from the Supreme Court of the Territory of Montana.

ARGUMENT FOR APPELLEE.

This case involves the validity of a tax and is founded upon the following agreed statement of facts:

"1. That the First National Bank of Butte is now and was during all of the year 1885 and before that time a corporation duly created under and by virtue of the laws of the United States relating to national banks, and located and carrying on a general banking business in Butte city, in said county of Silver Bow and Territory of Montana, and that the capital stock of said bank is one hundred thousand dollars, divided into one thousand shares of one hundred dollars each.

"2. That during all of said year 1885 the said defendant, Andrew J. Davis, was the owner and holder of nine hundred and forty shares of the capital stock of said bank, and that said shares of the capital stock of said bank and that said shares were during all of said year and are now of the true value in money at private sale and of the market value (which is the same) of one hundred and twenty-five dollars each.

"3. That for and in the said year 1885 there was duly levied and assessed, according to the laws of Montana Territory, in said Silver Bow county, for Territorial, county, and other purposes, upon all property in said county subject to taxation, an *ad valorem* tax amounting in all to thirteen and three-tenth mills on each dollar of assessed valuation.

"4. That said nine hundred and forty shares of stock of the said The First National Bank of Butte were assessed for taxation, in the manner prescribed by the laws of said Montana Territory for said year 1885, to said defendant, Andrew J. Davis (who then owned and held said shares in said county of Silver Bow), at their estimated true value in money at private sale and at their market value (which is the same); that said defendant has not nor has said bank or any one for him or it ever paid said tax on said shares so assessed as aforesaid or of any part of said tax.

"5. That in the general assessment in said Silver Bow county for said year 1885, shares of stock in corporations generally were assessed in accordance with the provisions of section 1003 of chapter LIII of the fifth division of the Revised Statutes of Montana Territory, as amended by the act of the Legislature of February 22, 1881, on page 67 of the laws of 1881, and where the entire capital stock of any incorporated company were invested in assessable property in said Territory such stock or the shares thereof were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent from the United States were assessed at the Government price of five dollars per acre without regard to their market value; that there are a large number of mining corporations in Montana Ter-

ritory whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims. It is agreed that all objections to the right of plaintiff to sue for unpaid taxes of said county of Silver Bow or to make this agreed case and submission and all objections to the regularity of the levy of the tax and of the assessment to the defendant for the year 1885 of said above-mentioned shares of stock, be and are hereby waived, and for the purpose of this case it is admitted that the board of commissioners aforesaid is the proper plaintiff herein, and that all the proceedings for the levy and assessment of said tax to defendant upon said shares of stock owned by him are and have been regular and are valid and legal if said shares of stock are subject to taxation at all.

"The object of this agreed case is to have upon the above facts the decision of the court and judgment accordingly as hereinafter provided upon each and all of the following questions of law in difference between the parties without regard to the regularity of the levy of the tax or of the assessment to defendant or the question of proper parties:

"1. Under the laws of the United States and of the Territory of Montana are shares of stock in national banks located in said Territory subject to taxation at all.

"2. Upon the facts in this case was the said assessment and taxation of said shares of stock to defendant in violation of or in conflict with the restriction contained in section 5219 of the Revised Statutes of the United States relating to the taxation of shares of national banks and providing that such taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of the Territory.

"It is agreed—

"1st. That if the court shall decide that said shares are not taxable at all, or shall decide the 2d question above stated in the affirmative, judgment shall be rendered herein for the defendant for costs subsequent to the trial.

"2. That if the court shall decide that said shares are taxable and shall also decide the said 2d question above

stated in the negative judgment herein shall be rendered for the said plaintiff and against the said defendant for the sum of fifteen hundred and sixty-two and $\frac{75}{100}$ dollars (being the amount of tax at thirteen and three-tenths mills on each dollar on said nine hundred and forty shares of defendant at one hundred and twenty-five dollars per share for said year 1885) without penalty and without interest prior to judgment and for costs subsequent to the trial.

"The right of appeal from any judgment of said district court herein according to law is reserved to each party hereto."

The district court gave judgment for the plaintiff below, and the Supreme Court of the Territory affirmed the judgment.

It is now claimed by appellant that that judgment was erroneous for two reasons:

First. That under the provisions of the National Banking Act, shares in national banks in the Territories are not taxable; and

Second. That the laws of Montana unjustly discriminate against the defendant in the taxation of his bank stock, and therefore that the tax is void.

1. It is true that section 5219, Rev. Stat., 1015, does refer in express terms to a State and does not contain the word Territory.

It is as follows:

"SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a

greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as any other real property is taxed."

If this section stood alone I admit that the contention of the appellant might possibly have force; but it does not stand alone. It is found in the act which contains many other provisions and which creates the national banking system and covers twenty pages of the Revised Statutes, pages 998–1019.

A careful examination of the act will, I think, satisfy this Court that Congress intended that national banks in the Territories should be taxed as well as those in the States.

Sec. 5134, being the second section of the act, requires that the organization certificate shall specify "the State, "Territory, or district, and the particular county and city, "town, or village."

Sec. 5146 requires that "at least three-fourths of the "directors must have resided in the State, Territory, or "district, in which the association is located, for at least "one year immediately preceding their election, and "must be residents therein during their continuance in "office."

Sec. 5178 provides that $150,000,000 of the entire amount of circulating notes ($354,000,000) shall be apportioned "in the States, in the Territories, and in the District of "Columbia, according to representative population."

Sections 5179 and 5180 contain further provisions in regard to banking in the Territories.

Sec. 5197 provides that any banking association may take "interest at the rate allowed by the laws of the "State, Territory, or district where the bank is located, "and no more."

Sec. 5239 provides for a forfeiture of the franchises, and that "such violation shall, however, be determined and "adjudged by a proper circuit, district, or Territorial court "of the United States."

Section 5157 has an important bearing upon the question now under consideration. It provides that "the pro- "visions of chapters two, three, and four of this title, which "are expressed without restrictive words as applying to "'national banking associations,' or to 'associations,' apply "to all associations organized to carry on the business of "banking under any act of Congress."

Section 5219 is contained in chapter three.

Section 5242 provides that "no attachment, injunction, "or execution shall be issued against such association or "its property before final judgment in any suit, action, or "proceeding in any State, county, or municipal court."

From the foregoing it may be fairly, and, as it seems to me, conclusively argued that Congress intended that Territories should enjoy the same banking privileges as the States.

It was intended to create a general system which should apply to all of the territory of the United States. The grant was the same to all. The privileges were the same, and it is but the commonest dictate of justice that the burdens imposed should be equal upon all.

This Court will not hold that a national bank located in a State shall be taxed, but one located in a Territory shall escape all taxation, unless it can find no other interpretation of the words used in the statute.

Ordinarily the word State would not include a Territory,

but it may be found in such connection with other provisions of the same statute as to require an enlarged signification. It may mean any organized political community.

In Hepburn *v.* Ellery (2 Cranch, 342), relied upon by the other side, Chief-Justice Marshall said: "On the part of "plaintiffs it has been urged that Columbia (District of) "is a distinct political society, and is, therefore, 'a State' "according to the definitions of writers on general law. "This is true, but as the act of Congress obviously uses "the word 'State' in reference to that term as used in "the Constitution, it becomes necessary to inquire whether "Columbia is a State in the sense of that instrument?" And he held that it was not.

Taxation is essential to the existence of government. The Territories, equally with the States, can impose taxes. They are given by Congress the express power of legislating upon all rightful subjects. That taxation is a rightful subject of legislation needs no argument before this Court.

Looking at the rightfulness and necessity of taxation and the whole scope and spirit of the banking act, and the unjust consequences that would result from a contrary construction, and I feel confident that this Court will hold that the provisions of section 5219 apply as well to a national bank located in a Territory as to one located in a State.

2. The second point relied upon is that the tax is void, because the laws of Montana unjustly discriminate against the defendant.

The statute, under which the tax is assessed, is as follows:

"SECTION 1003. All other property, real or personal, within the Territory is subject to taxation in the manner

herein directed, and this is intended to embrace improvements on lands and lots in towns, including land bought from the United States and from this Territory, whether bought on credit or otherwise, being franchises which, for the purposes of this chapter, are to be considered real property; ditches and flumes, horses, oxen and other cattle, except calves under eight months old, which shall be exempt from taxation; mules and asses, sheep, swine, and goats; money in coin or gold dust, whether in possession or on deposit, and including bank bills; property or labor due from solvent debtors on contract or on judgment, whether in this Territory or not, mortgages and other like securities; stocks or shares in any bank or company, incorporated or otherwise, and whether incorporated by this or any other Territory or not, *except that where the entire capital stock of any incorporated company shall be invested in assessable property in the Territory of Montana, such stock shall not be taxed;* public stock or lands; household furniture not otherwise exempt, including gold and silver plate, musical instruments, watches and jewelry; pleasure carriages, stages, hacks, and other vehicles for transporting passengers; wagons, carts, drays, sleds, and other descriptions of vehicles or carriages; boats and vessels of every description, whenever registered or licensed, and whether navigating the waters of this Territory or not, if owned either in whole or in part by persons who are inhabitants of this Territory; annuities, but not including pensions from the United States or any of the States."

That shares of stock in a national bank are a proper subject of taxation is no longer an open question in this Court.

In the very recent case of Palmer *v.* McMahon (133 U. S. 660), the authorities are all reviewed in an able opinion by the Chief-Justice, and the shares held subject to a State tax.

This being so, it seems to me that this second point is very easily disposed of. The agreed statement admits

that the tax was regularly and properly assessed and is valid if the shares of bank stock are subject to taxation at all. (Record, p. 2, folio 4.) And they are clearly subject to taxation unless the *entire capital stock of the bank was invested in assessable property in the Territory of Montana.*

There is nothing in the agreed statement or in the Record to show either that the *entire* capital or *any portion* of the capital was thus invested. That settles the question. I fail to see the relevancy of paragraph 5 of the agreed statement, so far as it relates to the subject and mode of taxation. It has nothing to do with this case, because the agreed statement does not bring it within its terms, and because it is immaterial how the shares or the stock of a mining company are taxed. Counsel on the other side have argued this question as though section 5219 of the Rev. Statutes provided that the shares of national banks could not be assessed by the State at any greater rate than was imposed upon any corporation or company within the State; and because mining companies sometimes escaped all taxation, where no patents had issued, or paid but five dollars per acre after patent, that therefore national bank shares could not be taxed at any greater rate than mining companies, and that the present tax was at a greater rate.

I think they have misapprehended the true meaning of section 5219.

It does not prohibit taxation of the shares in a national bank at a greater rate than that imposed upon any company or corporation in the State. It prohibits only a greater rate "than is assessed upon *other moneyed capital* "*in the hands of individual citizens of such State.*" Mining stock is not "moneyed capital" within the purview of this section. "Moneyed capital" is *capital invested in money or relating to money*, such as banks, saving institutions, loan companies, and the like.

It will hardly be claimed that a company or corporation, with a capital divided into shares, and created for the purpose of breaking up raw prairie in a prairie State, would be a moneyed company or corporation. If the State, in view of the advantages that it would derive from such a company, should declare it free from taxation, it would not be in the mouth of a stockholder in a national bank to claim that his shares were exempt from taxation. To permit it to be done would be doing violence to the accepted and generally understood signification given to the term "moneyed capital."

The judgment of the Supreme Court of the Territory was right and should be affirmed.

J. H. McGOWAN,
Atty. for Appellee.

APPENDIX.

For convenience of reference we reprint here, from the record, the opinion of the court below. After stating the facts of the case and quoting sec. 5219 of the Rev. Stats., the court says:

"1. The proposition of the appellant is that by virtue of this section, the right to tax national bank shares is limited to national banks located and doing business in a State and that such shares are not subject to taxation in a Territory.

"In construing this section reference must be had to all the sections, and to the general scope and meaning of the act of Congress authorizing and establishing our national banking system. The sections or different parts of every statute must be construed together and as they are modified by one another. If the object and intent of a statute is distinctly defined and clearly expressed ordinary words will be given such a meaning, if they have such a meaning, as to make them harmonize with such object and intent, even though they might be so interpreted as to be in conflict therewith. The word "state" has various meanings. It may mean a place; it may mean an organized political community. If used in the latter sense the word might mean the same as territory, for that is also an organized political community. The general scope and purpose of this act of Congress was to give to the people of the United States, whether they lived in a State or in a Territory, a uniform system of banking, whereby they should be authorized to form associations for carrying on that business. It requires such associations in their certificates to name the place where its operations of discount and deposit are to be carried on, designating the State,

Territory, or district and the particular county, city, town, or village. Sect. 5134.

"Here the words state, territory, or district mean simply the place—the locality in which the business is to be carried on. The right to form such associations is made a privilege—a franchise—which is distributed equally among the people of the States and Territories according to the population of either (see sects. 5178, '9, '80), and every association is allowed to charge and to receive interest at the rate allowed by the laws of any State, Territory, or district where the bank is located. (Sect. 5197.)

"Penalties for violating any of the provisions of the act by the officers of any banking association are the same whether such violation occurs in a State or Territory. Sect. 5239.

"The banking system created and established by the act extends alike to the States and Territories. The Constitution and the laws of the United States, which are not locally inapplicable, have the same force and effect in the Territories as elsewhere within the United States (U. S. Rev. Stats., 1891). The Territories are as much a part of the United States as are the States. There is but one banking system for all. No provisions of the banking act are locally inapplicable to the Territories. The legislative powers of the Territories extend to all rightful subjects of legislation. It is just as competent for a territorial Legislature to determine and to direct the manner and the place of taxing personal property as it is for a State Legislature to do the same thing. In this respect their powers are alike. Either may levy and assess taxes upon property subject to taxation within its jurisdiction. Each must raise a revenue by taxation for carrying on the local government. The national banking system extending over each alike, it would seem that the words of section 5219 in assessing taxes imposed by the authority of the State within which the association is located ought to be interpreted to mean the legislative authority or the authority within the locality in which the banking association is situated that may rightfully and legally levy and assess taxes upon personal property. Otherwise burdens are im-

posed upon banking associations in the States and exemptions are allowed to those in the Territories, which would be inconsistent with the whole spirit of the act, which was designed to give a uniform system to every locality. If this interpretation of the word 'State' be correct, then there are no restrictive words in section 5219, which is a part of chapter three of the act, and is controlled by section 5157, which provides that the provisions of chapters two, three, and four, which are expressed without restrictive words as applying to 'national banking associations,' or to associations, apply to all associations organized to carry on the business of banking under any act of Congress. If this interpretation is not correct, then by virtue of the same section the real estate of any banking association in a Territory is exempt from taxation, and by virtue of section 5242 attachments and injunctions may issue against banking associations before final judgments if located in a Territory; and so if the word State means one of the United States and not the place in which the banking association is located, then, while the Comptroller of the Currency by virtue of section 5181 is given authority to equalize the currency in a State according to the population, he has no such power in the Territories. These incongruities are avoided and the act made consistent and harmonious by giving to it a uniform operation in the States and Territories, which can be done without violating any of its words or phrases and which was the evident purpose of Congress when it provided a banking system for the people of the United States.

"2. The second proposition is that by the laws of Montana and by the showing of the agreed statement of facts there has been an unjust discrimination against the appellant in the taxation of his shares of national bank stock. The statute of the Territory concerning property subject to taxation provides, among other things, for the taxation of 'stocks and shares in any bank or company, incorporated or otherwise, and whether by any other State or Territory or whether situated in this Territory or not, except that where the entire capital stock of any incorporated company shall be invested in assessable property in

the Territory of Montana, such stock shall not be taxed.' (12th Sess. Laws, p. 67.)

"The sixth finding of fact is, in substance, that in the year 1885, in Silver Bow county, shares of stock in corporations generally were assessed in accordance with the provisions of the foregoing statute, and where the entire capital stock of any incorporated company was invested in assessable property in the Territory such stock or the shares thereof were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent were assessed at the Government price of five dollars per acre without regard to the market value; that there are a large number of mining corporations whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims.

"It is also found as a fact that nine hundred and forty shares of stock in the First National Bank of Butte, in said county, were assessed and taxed for the year 1885 at the market value and at the same rates as other property in said county. Shares in corporations represent the capital stock. If the capital stock is taxed the shares ought not to be, and if the shares are taxed the capital stock ought to be exempt. If both are taxed there would be double taxation. To prevent this the Legislature provided that if the entire capital stock was in the Territory and assessable, the shares should be exempt. The converse of this would be true, that if the capital stock was not assessable the shares would be subject to taxation. If the capital stock was not within the Territory, and therefore not assessable, or if it was exempt from taxation by law the result would be the same and the shares would be subject to taxation. National bank shares are taxable, but the right to tax them is subject to the condition that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens. (Sect. 5219, U. S. Rev. St.)

"How is other monied capital in the Territory taxed? This is the first thing to be determined in order to ascertain if the taxation of bank shares is an unjust discrimina-

tion. The agreed statement of facts shows that there are a large number of mining corporations in the Territory whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims assessed for taxation at the rate of five dollars per acre without regard to market value. The capital stock being assessable and subject to taxation, the shares which merely represent such capital stock are and ought to be exempt. Otherwise the same property would be taxed twice for the same year. But if, for any reason the capital stock of these corporations could not be reached for taxation, then the shares would become assessable under the statute of the Territory. National bank stock is in that condition. It is not subject to taxation. It is represented by Government bonds which are exempt, and hence bank shares become assessable the same as the shares in other corporations whose capital stock is not invested in the Territory; and in order to show an unjust discrimination against bank shares it would be necessary to show that the taxation of such shares resulted in a higher or greater tax upon the money invested than results in the taxation of the capital stock of those corporations whose capital stock is assessable in the Territory.

"It is immaterial whether the taxation is upon the shares or upon the capital stock if the tax upon the money invested is equal.

"Mining claims are real estate, and it is legal for national banks to purchase and to hold such claims. If other corporations invest in such claims and they are taxed at the rate of five dollars per acre without regard to the market value there is no unjust discrimination against national banks, unless the mining claims which they may own are taxed at a higher rate. Nothing of this kind appears in the agreed statement of facts.

"It is said in appellant's argument that it may be safely asserted that no corporation formed under the laws of Montana and doing business in the Territory but has its entire capital stock invested in assessable property in the Territory, and that the shares of stock in such corporations are exempt from taxation.

"Taking this statement to be true, it simply shows that

the capital stock is taxed instead of the shares, but does not touch the proposition that the shares ought to be exempt where the capital stock is not taxed. Suppose the capital stock is not in the Territory or assessable here, and that is the case in hand. The fact that the shares in other corporations whose capital stock is assessable in the Territory are exempt from taxation has no bearing on the question. The inquiry is as to an unjust discrimination against bank shares. If money is invested in such shares and taxed at the same rate as money invested in mining or other corporations, then there can be no just cause of complaint, because in one case the money is taxed as shares and in the other as capital stock.

"There is no discrimination against a bank where its capital stock is taxed in the form of shares, and in favor of other corporations whose shares are exempt, but whose capital stock is taxed. In either case the moneyed capital of the corporation is taxed, and it does not make much difference by what name it is called. It would be an unjust discrimination in favor of national banks not to tax their shares (their capital stock being exempt), while at the same time subjecting to taxation the capital stock of other corporations whose entire capital stock is invested in assessable property in the Territory. Shares in national banks are taxable even though the entire capital stock is invested in United States bonds, which are exempted from taxation.

"Van Allen *v.* Assessors, 3 Wall. 573.

"People *v.* Commissioners, 4 Wall. 244.

"It is not shown that the entire capital stock of the bank of the appellant or that any part of such stock is invested in assessable property in Montana whereby its shares of stock become exempt. The board of commissioners for each county sits as a board of equalization to hear complaints and to adjust and to equalize taxation, but it is not shown that the bank or the appellant ever appeared before such board to have the assessment on these shares reduced or remitted or to show that there was a discrimination against the bank in assessing these shares. If it had been shown there or here in the agreed statement of fact that the capital stock of the bank was invested

in assessable property in the Territory, or that it owned property in the Territory which had been assessed at a higher rate than that of similar property belonging to other corporations in the Territory, or that such deductions had not been made as had been allowed to such other corporations, then there would have been just cause of complaint. If there were no deductions to be made from the amount of the tax the tax would be legal, even though the statute prohibited the making of authorized and lawful deductions. The denial of a right is no injury to him who has no right to enforce. Says Justice Miller in 'Supervisors *v.* Stanley,' 105 U. S. R. 311: 'What is there to render it (the statute of New York) void as to a shareholder in a national bank who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What interest has he in a question that only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect?'

"The statute of the Territory is not invalid because it subjects bank shares to taxation and exempts the shares of other corporations. In order to affect its validity it would be necessary to show that there is an unjust discrimination in the amount of the tax upon the money invested in bank shares and money invested in the shares of other corporations in the Territory, and this cannot be shown while it appears that in one case the money is taxed at equal rates as shares and in the other as capital stock invested in the Territory.

"The appellant has no legal interest in the question as to how money invested in other corporations in the Territory is taxed unless he can show that his money invested in bank shares is taxed at a greater rate, thereby making an unjust discrimination against his investment. Such discrimination does not appear for the following reasons:

"1. It is not shown that the bank has any of its capital stock invested in assessable property in Montana.

"2. It is not shown that it is the owner of any mining